

NTSB Order No. EA-4016

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 1993

Respondent .

Docket SE-12719

fine. We grant the appeal and reinstate the order of revocation.

The Administrator sought revocation for violations of 14 C.F.R. 91.9 and 61.15(a)(2), as well as 49 U.S.C. App. 1429(c)(2).² At the hearing, respondent admitted that he had been the pilot-in-command of a flight carrying marijuana for distribution, that he knew there was marijuana aboard, and that his action violated state law and otherwise met the terms of § 1429(c)(2). Respondent also admitted that he had been convicted, under 18 U.S.C. 841(a)(1), of one count of manufacture of marijuana. At the time of the hearing, respondent was continuing to serve the probation ordered by the court.

Because respondent admitted (with only one minor and immaterial exception) all the allegations in the complaint, the only issue at the hearing was that of sanction. The law judge

²§ 91.9(a) (now 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 61.15(a)(2) provided:

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--

(2) Suspension or revocation of any certificate or rating issued under this part.

49 U.S.C. App. 1429(c)(2) provides that the Administrator "shall revoke" the certificates of any person who: 1) knowingly engaged in an activity, other than simple possession, related to a controlled substance and punishable by death or imprisonment of more than 1 year; 2) used an aircraft to carry the drug or facilitate the drug-related activity; and 3) was on board or served as an airman in connection with the activity.

took testimony from the respondent and others on this point. As the result of an accident, respondent is confined to a wheelchair. He has a special issue medical certificate that permits him to operate an aircraft using hand controls, and he is working, and doing test flying on, a prototype for a ram air engine modification. Revocation would obviously prohibit his performing the test flights. Respondent further testified to his belief that loss of his certificate would adversely affect his opportunity for advancement with his present employer.³

Witnesses supporting respondent testified to their belief that he would no longer participate in illegal behavior. See, e.g., Exhibit R-1 letter from probation officer. The law judge concluded:

looking at all the facts and circumstances herein and in no way denigrating the seriousness of he [sic] activity but taking into account the present circumstances and the interest of the public which is aviation safety, I would modify the period of revocation to that of a suspension of ten months plus the imposition of a civil penalty if [sic] \$500.

Tr. at 54.

On appeal, the Administrator contends, citing Rawlins v. National Transportation Safety Board, 837 F.2d 1327 (5th Cir. 1988), that the law judge exceeded his authority in reducing the sanction.⁴ The Administrator relies on 49 U.S.C. App. 1429(c)(2)

³Respondent was hired by Jeppeson Sanderson after his accident. He does not believe his job would be endangered by loss of his certificate, but believes advancement would not be possible.

⁴The Administrator wrongly cited Rawlins as reported at 837

and (3), arguing that, under (c)(2), the Administrator has no discretion but to revoke respondent's certificate and that, under (c)(3), the Board has no authority to do other than affirm or reverse the Administrator's order.⁵ The Administrator further argues that, given respondent's use of an aircraft in the crime, precedent clearly supports the sanction of revocation.

In reply, respondent contends that the Administrator himself has repudiated Rawlins and that the Administrator's own policy, as set forth in Compliance and Enforcement Bulletin No. 90-2, Appendix 1 of FAA Order 2150.3A (see Exhibit R-3), authorizes a sanction less than revocation.⁶ Respondent further argues that this policy, developed subsequent to Rawlins, constitutes "written agency policy guidance available to the public relating to sanctions . . ." to which we may properly defer. See 49 U.S.C. 1429(a), as amended in P.L. No. 102-345, the FAA Civil Penalty Administrative Assessment Act of 1992 (the CP Act). Respondent believes that the law judge, in reducing the sanction, (..continued)
F.2d 1831.

⁵Subsection (c)(3) reads, in part:

Any person whose certificate is revoked by the Administrator under this subsection may appeal the Administrator's order to the National Transportation Safety Board and the Board shall, after notice and a hearing on the record, affirm or reverse the Administrator's order.

⁶As pertinent, this order provides, in the case of drug convictions that do not involve falsification: "[f]or more than simple possession, except in extraordinary circumstances, revocation of any pilot or flight instructor certificates." Emphasis added.

found the extraordinary circumstances that are required under 90-2 to impose a lesser sanction.

Although the Fifth Circuit only offered dicta on the issue, being concerned with whether the Administrator himself, under § 1429, had discretion to impose a sanction less than revocation, our own decision in Rawlins confirms the Administrator's view of his and our authority. We stated there:

[T]he Safety Board's review authority in section 609(c)(3) is limited to affirming or reversing the Administrator's order. Thus, section 609(c) stands in sharp contrast to section 609(a), under which the Administrator is authorized to suspend or revoke a certificate and the Board may, in its review capacity, amend, modify or reverse the Administrator's order if it finds that affirmation is not required.

Administrator v. Rawlins, 5 NTSB 2036, 2037 (1987). Thus, as of 1987 at least, we had no jurisdiction to reduce a revocation order issued under section 609(c) (§ 1429(c)).

The CP Act now directs us, subject to conditions, to defer to the Administrator's "written agency policy guidance available to the public relating to sanctions . . .". On its face, the Administrator's revocation order here is not inconsistent with Bulletin 90-2's written policy guidance, as respondent has not established (and the law judge did not find) that respondent's situation is encompassed in the "extraordinary conditions" that in the Administrator's view might warrant a lesser sanction.⁷

⁷Revocation is consistent with Appendix 4 of 2150.3A, Enforcement Sanction Guidance Table, which provides for revocation in the event of conviction for unlawful carriage of a controlled substance. Exhibit R-2 at 19.

Moreover, contrary to respondent's claim, Bulletin 90-2's language is not inconsistent with Rawlins and need not be read so broadly as to create an exception to the revocation mandated in § 1429(c).⁸ In any case, the Administrator is without authority to modify the plain language of the statute (which, on its face, requires a revocation order in the circumstances here presented).

Accord Rawlins, 837 F.2d at 1329 ("Because the language of the statute is plain, we may not modify it by judicial construction.").

We also cannot find, as a broader matter, that our new authority under the CP Act -- to "modify the type of sanction to be imposed from suspension or revocation of a certificate to assessment of a civil penalty" (see 49 U.S.C. 1429(a)) -- would permit us to affirm the law judge here. We read that discretion as being coextensive with the underlying statutory provision. We compare, in this regard, the CP Act's additions to § 1429(a) and § 1429(c)(3). Both contain certain of the same provisions, but (c)(3) conspicuously does not include the above sentence empowering us to modify the sanction. Thus, we may reasonably assume that Congress declined to have the Board reduce the revocation sanction imposed by the Administrator under (c)(1).⁹

⁸Not only does 90-2 direct revocation in most cases, it is a general rule that does not interfere with the more specific provisions of § 1429(c).

⁹As in Rawlins, at footnote 5, we also note that revocation is a well-established sanction for drug offenses involving an aircraft and that, because revocation is based on lack of qualification, factors such as adverse financial impact and a respondent's attitude are not considered in mitigation of

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The revocation of respondent's private pilot certificate shall begin 30 days from the date of service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)
sanction.

¹⁰For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).